IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*

MOTION AND BRIEF FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rules 35 and 42(3) of the Rules of this Court, National Community Television Association, Inc., (NCTA) respectfully moves the Court to grant NCTA permission to file a Brief *Amicus Curiae* herein on the following grounds:

1. NCTA has requested permission of both parties herein to file a Brief *Amicus Curiae*. On October

4, 1967, Respondent United Artists Television, Inc., refused such permission.

2. NCTA is the national organization of the community antenna television industry, which industry will be directly affected by the outcome of this matter, and therefore NCTA is a vitally interested applicant.

3. The questions presented indicate conflicts of national policies affecting the entire CATV industry, the informational perspective to which lies peculiarly within the observation of an organization representing a substantial part of that industry.

4. The questions presented indicating a conflict of national policies are:

   A. Whether the imposition of copyright infringement liability on CATV systems announces a rule contrary to the policies of the Copyright Act and the Communications Act; and,

   B. Whether the extension of the statutory copyright monopoly to CATV systems announces a rule contrary to the policies of the national anti-trust laws.

5. NCTA believes that the parties, not representing the broad industry view, will present arguments more narrowly aimed at the effects of the ruling on the parties herein, and that, because the result will affect an entire industry, NCTA wishes to inform the Court of the CATV industry's viewpoint and of the severe impact of the decision on that industry.

6. The policies contained in the Copyright Act, the Communications Act, and the anti-trust statutes have a direct bearing on the extension of copyright monopolies, and may be dispositive of the case.

RESPECTFULLY SUBMITTED this 16th day of October, 1967.

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BRIEF

PRELIMINARY STATEMENT

Pursuant to Rule 42 of the rules of this Court, National Community Television Association, Inc., (NCTA) files this brief in support of its Motion for Permission to File Brief *Amicus Curiae* in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

INTEREST OF AMICUS CURIAE

National Community Television Association, Inc., (NCTA), incorporated in 1952, is the national trade organization of the community antenna television (CATV) industry, representing 881 CATV systems having 1,354,447 subscriber-homes or an average of 3,369,675 television viewers. NCTA reflects a source of information about the CATV industry which consists of about 1800 operating systems, 1153 enfranchised but not yet operating systems, and 1672 applicants for franchises. The opinions of the lower courts have a direct impact on NCTA, its members, as well as the public, both present and potential subscribers, the operating and potential CATV industry as a whole, and the more than ninety associate members of NCTA which supply the industry with goods and services. NCTA is vitally concerned with this impact, not only on its existence but that of the industry as a developing communications technology which has existed for almost twenty years.

ARGUMENT

I. The History and Posture of the Case

The opinion of the United States District Court for the Southern District of New York, dated May 23, 1966, reported at 255 F. Supp. 177, and the opinion of the United States Court of Appeals for the Second Circuit, dated May 22, 1967, reported at 377 F. 2d, treat a question of judicial first impression. The judgment sought to be reviewed was dated and entered on May 22, 1967, and Fortnightly Corporation invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). By order of this Court entered on July 21, 1967, the time for filing a Petition for Writ of Certiorari was extended until September 15, 1967, on which date Fortnightly Corporation filed its Petition for a Writ of Certiorari.

The Fortnightly Corporation's Petition presents questions of federal law which have not been but should be settled by this Court. These questions reveal judicial extension of the Copyright Act[1] by interpretation. The application of copyright sanctions will drastically modify and possibly threaten even the existence of the CATV industry. The entire CATV industry is filled with anxiety concerning its status with respect to, as used in the Copyright Act, a "performance", a performance "in public", a performance authorized by a license implied in law, double payment to the copyright owner sanctioned by the lower courts' decisions for a single broadcast performance, and all of the ramifications of copyright monopoly as it might be applied to CATV.

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[1] 17 U.S.C. § 1 *et seq.*

The statutory language and statement of the case have been fully set forth in Fortnightly Corporation's Petition, and the basis for federal jurisdiction in the court of first instance is contained in 28 U.S.C. § 1338.

II. The Expansion of the Copyright Monopoly

The decisions of the courts below impose copyright infringement liability on a television reception device for the first time, affecting the viability of about 1800 existing CATV systems and the television reception of almost ten million persons. If not reversed or modified, it extends the statutory copyright monoply of hundreds, perhaps thousands of copyright holders to a position of control over the reception of television. This control will allow copyright proprietors to follow their *rights* into the homes of television viewers by imposing a further charge on home television reception or by utilizing the right to black out signals which are otherwise receivable.

The expansion of the statutory monopoly creates an atmosphere in which copyright holders can initiate litigation which has the capacity to bankrupt CATV systems or result in their acquisition to satisfy the potentially huge amount of accrued damages. To see how this could be accomplished, one needs only to examine the structure of today's CATV industry.

The CATV industry is predominantly oriented toward small systems in smaller sized communities:

Size of City	Number of Systems in Cities of This Size Category	Number of U. S. Cities in Size Category
1,000,000 or more	1	5
500,000-1,000,000	5	16
250,000-500,000	1	30
100,000-250,000	15	79
50,000-100,000	66	180
25,000-50,000	131	366
10,000-25,000	314	978
5,000-10,000	327	1,282
2,500-5,000	324	1,763
1,000-2,500	320	3,515
Under 1,000	283	9,874
TOTAL	1,787	18,088

Total Population in Communities with Operating Systems	27,511,611
Total Population in Communities without Operating Systems	151,711,564
Total U. S. Population (1960 Census)	179,323,175

Source: *Television Digest's CATV & Station Coverage Atlas,* 1967-68 Ed., p. 4a

The average system has 1350 subscribers. The typical CATV systems arose in smaller communities to provide better reception and diversity of television signals, and in the larger cities to eliminate interference caused by terrain and large buildings. The average system employs about three persons in addition to the system owner. The average system simply distributes television signals received off-the-air to its subscribers. Audience rating services, such as American Research Bureau, include CATV subscribers in the average net weekly circulation of television stations, upon which

figures television advertising rates are computed. CATV systems, until distribution of the signals received, do not know the nature or content of the signals and cannot know whether the programming broadcast by the stations received contains copyrighted material. Because the system operator does not know in advance of the distribution of signals whether they will contain copyrighted works, as a practical matter, he is unable to negotiate for a license with the copyright holder. The small system operator's problems are compounded when, for instance, a television network program contains a copyrighted work and the system operator may not even know where to find the copyright owner. In the normal course of his business, the small system operator simply has no one with whom to negotiate a copyright license to distribute signals. Since he does not originate the programs, he cannot negotiate with program suppliers in a situation in which competition between program suppliers will keep the price of licenses within reach. He is limited to what the television stations are originating and must distribute their signals.[2]

To the average CATV system operator, the situation in which he finds himself is extremely alarming. To him the only question is the public's right to receive that which is broadcast into the ether. He cannot reconcile the fact that when he increases the ability of viewers to receive a television signal thereby increasing the advertising rates of the station and consequently the amount paid to the copyright owner, the decisions of the lower courts also require him to pay

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[2] The Federal Communications Commission has promulgated rules governing the operation of CATV systems. 47 C.F.R. § 74.1101 *et seq.*

additional amounts to the copyright holder even though the same signal may be available to his subscribers if they chose not to subscribe to his CATV service. To him this is purely and simply discrimination against his subscribers, as well as against a business enterprise which he has operated for many years. To him such a result is legally authorized double payment for one performance, and he desperately fears the consequences.

The average CATV system operator recognizes that due to the limitations of broadcast technology there is not as much service as there ought to be. The effect of the lower courts' decisions is to freeze that technology to a vague and indefinite standard of "normal" roof top antenna reception, enabling a copyright owner to carve out and control markets which were never contemplated in the Copyright or Communications Acts.

The potential damages which could be incurred under the decisions of the lower courts would not vary with the size of the system, the number of subscribers, or the system operator's ability to pay. Should damages be severely computed, the filing of a number of law suits could result in accrued damages which could exceed the monetary value of the CATV industry. Such a construction of the Copyright Act could foster the concentration of control over production, distribution, and exhibition of copyrighted product in the CATV industry which was struck down in the motion picture industry in *United States* v. *Paramount Pictures, Inc., et al.*[3] This control, if used in conjunction with broadcasters of television programming, through

[3] 344 U.S. 131 (1948).

the use of clearances or exclusive licenses, could create an atmosphere conducive to restraint of trade having more impact than was involved in *United States* v. *Loew's, Inc.*[4]. The United States Department of Justice has warned of the probability of that atmosphere.[5]

The real prospect of control of the CATV industry by copyright owners may present other conflicts with the national communications policy as enunciated in the rules and regulations promulgated by the Federal Communications Commission which restrict concentration of control of competitive communications media.[6] The Federal Communications Commission's rules compelling carriage of certain television broadcast stations' signals on CATV systems[7] is a policy which also apparently conflicts with the decisions of the lower courts in the instant case.

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[4] 371 U.S. 38 (1962).

[5] *See,* Statement of Edwin M. Zimmerman, Acting Assistant Attorney General, Department of Justice, *Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U. S. Senate, 89th Congress, 2nd Session, pursuant to S. Res. 201 on S. 1006, August 2, 3, 4, and 25, 1966* (hereinafter *Hearings pursuant to S. Res. 201 on S. 1006*), p. 211 *et seq.*

[6] See generally, 47 C.F.R. § 73.636. It should be noted that television broadcast networks own about 20% of all network programming. See *Hearings pursuant to S. Res. 201 on S. 1006,* at 212, n. 2.

[7] 47 C.F.R. § 74.1103. The entire regulatory scheme is being examined in cases pending in the United States Court of Appeals for the Eighth Circuit, *Midwest Video Corp. et al.* v. *U. S. et al.,* Case Nos. 18052 and 18348. *See also, Southwestern Cable Co.* v. *U. S. et al.,* 378 F. 2d 118 (9 Cir., 1967) *pet. for cert. filed,* 36 U.S.L.W. 3045 (U.S. July 13, 1967) (No. 363) and 36 U.S.L.W. 3061 (U.S. July 27, 1967) (No. 428).

CONCLUSION

The confrontation involves much more than the infringement of the copyright of one plaintiff by a CATV system defendant. The social, economic, and policy reverberations will sound throughout the nation now and for many years to come, affecting not only copyrights but the structure of an entire industry and the communications service to the public which that industry provides. NCTA believes that the novel questions presented are worthy of consideration by this Court.

Respectfully submitted,

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